

DECISION DOCUMENT

FOR
THE U.S. ENVIRONMENTAL PROTECTION AGENCY'S
APPROVAL OF THE

DRY CREEK RANCHERIA BAND'S APPLICATION

FOR
TREATMENT IN THE SAME MANNER AS A STATE
FOR
THE WATER QUALITY STANDARDS AND CERTIFICATION PROGRAMS UNDER
CLEAN WATER ACT SECTIONS 303 AND 401

OCTOBER 2011

TABLE OF CONTENTS

I. Introduction and Administrative Record	3
A. Introduction	3
B. Administrative Record	3
1. Application	3
2. Letters from EPA	3
3. Comments by Appropriate Governmental Entities	4
4. Capability Review	4
5. Statutory and Regulatory Provisions	4
6. Policy Statements	5
II. Requirements for TAS Approval	5
A. Federal Recognition	6
B. Substantial Governmental Duties and Powers	6
1. Form of Tribal Government	6
2. Types of Governmental Functions and Source of Tribal Governmental Authority	7
3. Conclusion	7
C. Jurisdiction Over Waters Within the Borders of the Dry Creek Rancheria Band of Pomo Indians Reservation	8
1. Map or Legal Description	8
2. Statement Describing Basis of Tribe's Authority	8
3. Identification of the Surface Waters for Which the Tribe Proposes to Establish Water Quality Standards	8
4. Conclusion	9
D. Capability	9
III. Conclusion	10
Appendix I - Index to the Administrative Record	
Appendix II - Response to Comments	

I. Introduction and Administrative Record

A. Introduction. Section 303(c) of the Clean Water Act (CWA), 33 U.S.C. § 1313(c), requires the States to develop, review and revise water quality standards for surface waters of the United States. At a minimum, such standards must include designated water uses, in-stream criteria to protect such uses, and an antidegradation policy. 40 C.F.R. § 131.6. In addition, Section 401 of the CWA provides that States may grant or deny “certification” for federally permitted or licensed activities that may result in a discharge to the waters of the United States. The decision to grant or deny certification is based on the State’s determination regarding whether the proposed activity will comply with, among other things, water quality standards it has adopted under Section 303. If a State denies certification, the Federal permitting or licensing agency is prohibited from issuing a permit or license.

Section 518(e) of the CWA, 33 U.S.C. § 1377(e), authorizes EPA to treat eligible tribes in a similar manner as a state (TAS) for certain CWA programs, including Sections 303 and 401. EPA regulations establish the process by which EPA implements that authority and determines whether to approve a tribal application for TAS for purposes of administering Sections 303 and 401 of the CWA. See 56 Fed. Reg. 64876 (December 12, 1991), as amended by 59 Fed. Reg. 13814 (March 23, 1994) (codified at 40 C.F.R. Part 131).

This Decision Document provides the basis and supporting information for EPA’s decision to approve the application from the Dry Creek Rancheria Band of Pomo Indians (the “Tribe”) to administer Section 303(c) and Section 401 of the CWA, pursuant to Section 518(e) of the CWA and 40 C.F.R. Part 131. This approval applies to administration of the water quality standards program and Section 401 certification program for waters that lie within the exterior borders of the Dry Creek Rancheria Band of Pomo Indians Reservation (Reservation). The Reservation consists of 75 acres of tribal trust land located in Geyserville, California. See Attachments 10 and 13 of the Tribe’s application transmitted on February 23, 2011, from Harvey Hopkins, Chairman, Dry Creek Rancheria Band of Pomo Indians, to Jared Blumenfeld, Regional Administrator, USEPA, Region 9.

B. Administrative Record. The following documents comprise a portion of the administrative record for this decision. An index to the administrative record for this decision is attached as “Appendix I.”

1. Application. The Tribe’s application for TAS eligibility to administer the Water Quality Standards and Certification Programs under Sections 303 and 401 of the CWA, including exhibits and a letter of transmittal from Harvey Hopkins, Chairman, Dry Creek Rancheria Band of Pomo Indians, to Jared Blumenfeld, Regional Administrator, USEPA, Region 9, dated February 23, 2011 and hand-delivered to EPA on March 7, 2011. (Application).

2. Letters from EPA. A May 20, 2011 letter from Jared Blumenfeld, EPA Region 9

Regional Administrator, to “affected governmental entities”¹ that offered an opportunity to comment on the Tribe’s assertion of authority in its Application, and enclosed a copy of the Tribe’s Application which includes the Tribe’s assertion of authority and a copy of the maps showing the Reservation lands over which jurisdiction was being asserted. The letter was sent to the following:

- a. The Honorable Jerry Brown
Governor, State of California
State Capitol, Suite 1173
Sacramento, CA 95814
- b. Amy Dutschke
Regional Director
U.S. Bureau of Indian Affairs
2800 Cottage Way
Sacramento, CA 95825

The letter recognized that city and county governments and other interested parties might also wish to comment, and noted that EPA was placing a notice in the daily *Press Democrat*, the largest newspaper between San Francisco and the Oregon border, announcing the Tribe’s TAS Application and assertion of authority. The notice informed interested parties that they could obtain a copy of the Tribe’s assertion by calling EPA or could see the complete Application at the EPA Region 9 offices. It requested interested parties to submit written comments through the State California Water Resources Board.

3. Comments by Appropriate Governmental Entities. EPA’s consideration of comments is limited to the Tribe’s assertion of authority. 40 C.F.R. § 131.8(c)(3). The only comment letter EPA received was from Thomas Howard, Executive Director, State Water Resources Control Board, dated July 5, 2011, on behalf of Governor Brown. The letter did not object to the tribe’s assertion of authority. EPA’s response to the comments in this letter is attached as “Appendix II.”

4. Capability Review. By memorandum dated July 14, 2011, Janis Gomes, EPA Region 9, Water Division, Tribal Office, reviewed the capability of the Tribe to administer the water quality standards program and determined that the Tribe has adequate capability.

5. Statutory and Regulatory Provisions.

a. Section 518(e) of the Clean Water Act, 33 U.S.C. § 1377(e), authorizes EPA to treat an eligible Indian tribe in the same manner as a state if it meets specified eligibility criteria.

¹ EPA defines the term “appropriate governmental entities” as “States, tribes, and other Federal entities located contiguous to the reservation of the tribe which is applying for treatment as a State.” 56 Fed. Reg. at 64884.

b. "Amendments to the Water Quality Standards Regulation that Pertain to Standards on Indian Reservations," 56 Fed. Reg. 64876 (codified at 40 C.F.R. Part 131) establish the requirements for a Tribe to obtain TAS approval.

6. Policy Statements.

a. EPA Policy for the Administration of Environmental Programs on Indian Reservations, November 11, 1984, which was reaffirmed most recently by EPA Administrator Jackson on July 27, 2009.

b. Memorandum entitled "EPA/State/Tribal Relations," by EPA Administrator Reilly, July 10, 1991.

c. Memorandum entitled "Adoption of the Recommendations from the EPA Workgroup on Tribal Eligibility Determinations," by EPA Assistant Administrator, Robert Perciasepe, and General Counsel, Jonathan Cannon, March 19, 1998.

d. Memorandum entitled "Strategy for Reviewing Tribal Eligibility Applications to Administer EPA Regulatory Programs," by EPA Deputy Administrator Marcus Peacock, January 23, 2008.

II. Requirements for TAS Approval.

Under CWA Section 518(e) and EPA's implementing regulation at 40 C.F.R. § 131.8(a), four requirements must be satisfied before EPA can approve a tribe's TAS application to administer a water quality standards program under CWA Section 303(c) and certification under Section 401. These are: (1) the Indian tribe is recognized by the Secretary of the Interior and exercises authority over a reservation as provided in 40 C.F.R. §§ 131.3(k) and (l); (2) the Indian tribe has a governing body carrying out substantial governmental duties and powers; (3) the water quality standards program to be administered by the Indian tribe pertains to the management and protection of water resources that are within the borders of the Indian reservation and held by the Indian tribe, within the borders of the Indian reservation and held by the United States in trust for Indians, within the borders of the Indian reservation and held by a member of the Indian tribe if such property interest is subject to a trust restriction on alienation, or otherwise within the borders of the Indian reservation; and (4) the Indian tribe is reasonably expected to be capable, in the Regional Administrator's judgment, of carrying out the functions of an effective water quality standards program in a manner consistent with the terms and purposes of the Act and applicable regulations.

EPA's regulations at 40 C.F.R. § 131.8(b) identify what shall be included in an application by an Indian tribe for administration of a water quality standards program. Where EPA determines that an Indian tribe is eligible to the same extent as a state for purposes of water quality standards, the tribe likewise is eligible to the same extent as a state for purposes of certifications conducted under Section 401 of the CWA. 40 C.F.R. § 131.4(c). For purposes of

administering Section 401 of the CWA, the Tribe operates pursuant to 40 C.F.R. Part 121, including the designation of a certifying person or agency pursuant to 40 C.F.R. § 121.1(e). Today's decision does not, however, constitute an approval or disapproval of Tribal Water Quality Standards, which will be addressed in a separate process.

A. Federal Recognition.

EPA can approve a TAS application for water quality standards under Section 303(c) and certification under Section 401 only from those "Indian Tribe[s]" that meet the definition set forth in CWA Section 518(h). 33 U.S.C. § 518(e), 40 C.F.R. § 131.8(a)(1). The term "Indian tribe" is defined as "any Indian tribe, band, group, or community recognized by the Secretary of the Interior and exercising governmental authority over a Federal Indian reservation." Section 518(h) of the CWA, 33 U.S.C. § 1377(h); 40 C.F.R. § 131.3(l).

The record includes a narrative statement from the Tribe describing its reservation and letters from attorneys representing the Tribe describing the Tribe's authority to regulate water resources within the boundaries of the reservation. The Tribe is included on the Secretary of Interior's list of "Indian Entities Recognized and Eligible to Receive Services From the United States Bureau of Indian Affairs."² 75 Fed. Reg. 60810 (October 1, 2010), as supplemented by 75 Fed. Reg. 66124 (October 27, 2010). Based on the information that the Tribe has submitted to EPA in support of its application for TAS for the water quality standards and certification programs under Sections 303(c) and 401, respectively, and on the Secretary of Interior's formal recognition of the Tribe, EPA has determined that the Tribe meets the criteria of 40 C.F.R. §§ 131.8(a)(1) and (b)(1).

B. Substantial Governmental Duties and Powers.

To show that it has a governing body currently carrying out substantial governmental duties and powers over a defined area, 40 C.F.R. § 131.8(b)(2) requires that the Tribe submit a descriptive statement that should: (i) describe "the form of the Tribal Government"; (ii) describe the "governmental functions currently performed by the Tribal governing body"; and (iii) identify "the source of the Tribal government's authority to carry out the governmental functions currently being performed."

1. Form of Tribal Government. The Tribe's application includes a narrative statement describing its government, as well as copies of Tribal ordinances. The Tribal government in its current basic form has been functioning since 1972. The Tribe's Articles of Association, which were adopted on September 13, 1972, approved by the Department of the Interior on April 16, 1973, and amended on September 22, 1979, provide that the governing body of the Tribe is the Tribal Council, which consists of all Tribal members over the age of eighteen years. All power and responsibility of the government is vested in the Tribal Council which may delegate powers

² The Tribe appears on the Secretary of Interior's list as "Dry Creek Rancheria of Pomo Indians of California." 75 Fed. Reg. at 60811.

to the "Board of Directors." The Tribal Council elects from its membership the Board of Directors which consists of a Chairman, Vice-Chairman, Secretary-Treasurer, two (2) delegates, and such other temporary or permanent committees that are deemed necessary by the Tribal Council. The Tribal Council meets in the months of April and September, at times and places prescribed by the Chairman. The Board of Directors meet once a month at a time and place set by the Chairman. Under Article VII of the Tribe's constitution, the Board of Directors are empowered to "take such actions as are necessary to carry into effect the ordinances, resolutions, [and] other directions of the Tribal Council, represent the community in all negotiations with local, state and federal governments." The Tribe's Application satisfies 40 C.F.R. § 131.8(b)(2)(i) by adequately describing the form of its Tribal government.

2. Types of Governmental Functions and Source of Tribal Governmental Authority. The Tribe's application describes several types of governmental functions the Tribe currently performs. All powers and responsibilities of the Tribal government, including legislative authority are vested in the Tribal Council. The Board of Directors which is elected by the Tribal Council oversees the day to day operations of the Tribe. As noted above, the Board is required and empowered to effectuate the laws, policies and directions of the Council. The Council has approved various ordinances and policies to protect the health and welfare of Tribal residents including a water quality ordinance which establishes a permit and inspection program for any discharge into the waters of the Reservation; a solid waste disposal ordinance which establishes the authority to implement, regulate, and enforce environmental standards applicable to existing and proposed solid waste disposal activities; a sewer system ordinance which regulates installation of sewage systems and prohibits certain discharges into any public sewer; and a water well standards ordinance which sets standards for proper water well construction, maintenance, and destruction of wells.

The governmental department that is responsible for implementing the Tribe's environmental programs is the Department of Environmental Protection (DEP). Among other things, DEP is responsible for emergency response, environmental planning, forestry, protecting air and water and regulating solid waste. Additionally, DEP manages grants awarded under Sections 106 and 319 of the CWA, and grants received from Bureau of Indian Affairs, United States Fish and Wildlife Services and National Oceanic and Atmospheric Agency.

The Tribe has satisfied 40 C.F.R. § 131.8(b)(2)(ii) and (iii) respectively, by adequately describing the "governmental functions currently performed by the Tribal governing body," and the source of its authority to perform its current governmental functions.

3. Conclusion. Through its submissions in its Application, the Tribe has demonstrated that the Tribal governing body is currently carrying out substantial governmental duties and powers over a defined area as 40 C.F.R. §§ 131.8(a)(2) and (b)(2) require.

C. Jurisdiction Over Waters Within the Borders of the Dry Creek Rancheria Band of Pomo Indians Reservation.

Under 40 C.F.R. § 131.8(b)(3), the Tribe is required to submit a statement of authority to regulate water quality. The statement should include: (i) a map or legal description of the area over which the Tribe asserts authority to regulate surface water quality; (ii) a statement by the Tribe's legal counsel (or equivalent official) which describes the basis for the Tribe's assertion of authority, which may include a copy of documents such as Tribal Constitutions, by-laws, charters, executive orders, codes, ordinances, and/or resolutions which support the Tribe's assertion of authority; and (iii) an identification of the surface waters for which the Tribe proposes to establish water quality standards. 40 C.F.R. § 131.8(b)(3).

1. Map or Legal Description. The Tribe has submitted maps and a legal description of the Reservation which is located in Geyserville, California, in Sonoma County. The Reservation consists of a single 75-acre parcel, all of which is held in trust. The Rancheria is located approximately 75 miles north of San Francisco, at an elevation of 728' mean sea level in an area above the Alexander Valley, known for its vineyards and wineries. The Rancheria was acquired by the United States pursuant to the Indian Appropriation Act of August 1, 1914, which provided "[f]or the purchase of lands for the homeless Indians of California, including improvements thereon, for the use of said Indians" Pub. L. No. 63-159, 38 Stat. 582, 589. The Tribe has used and occupied the Reservation since the land was purchased in 1915.³

The Tribe has satisfied 40 C.F.R. § 131.8(b)(3)(i) by providing a map and a legal description of the area over which the Tribe asserts authority to regulate surface water quality.

2. Statement Describing Basis of Tribe's Authority. The Tribe's Application includes letters prepared by Michelle La Pena, Tribal Attorney, dated April 7, 2010, and December 20, 2010, describing the legal basis for the Tribe's regulatory authority over water resources within the Reservation. These letters assert that the Tribe has jurisdiction as a matter of its inherent authority as a sovereign government, and through the express language of CWA §518(e), which authorizes a tribe to exercise authority over "the management and protection over water resources ... within the borders of an Indian reservation." The Application states that there are no fee lands within the Reservation boundaries and that there are no leases of tribal trust lands.

The Tribe has satisfied 40 C.F.R. § 131.8(b)(3)(ii) by providing a statement by the Tribe's legal counsel which describes the basis for the Tribe's assertion of authority over waters within the borders of the Reservation.

3. Identification of the Surface Waters for Which the Tribe Proposes to Establish Water Quality Standards. The Tribe asserts authority over all surface waters within the Dry Creek Rancheria Band of Pomo Indians Reservation. See Application at 5; Attachment 10.

³ Letter dated December 20, 2010, from Michelle LaPena, Attorney at Law, to Jared Blumenfeld, Regional Administrator, page 1.

The Tribe has satisfied 40 C.F.R. §131.8(b)(3)(iii) by identifying the surface waters over which it proposes to establish water quality standards.

4. Conclusion. The Agency is satisfied that the Dry Creek Rancheria Band of Pomo Indians has adequate jurisdiction to set water quality standards for waters within the exterior boundaries of the Reservation. The Tribe has adequately demonstrated that it meets the requirements in 40 C.F.R. §§131.8(a)(3) and (b)(3). EPA finds that under well-established principles of Federal Indian law, the Tribe retains attributes of sovereignty over both its members and its territory and has authority to establish water quality standards. See, e.g., California v. Cabazon Band of Mission Indians, 480 U.S. 202, 207 (1987).

D. Capability.


To demonstrate that the Tribe has the capability to administer a water quality standards program, 40 C.F.R. § 131.8(b)(4) requires that the Tribe's application include a narrative statement of the Tribe's capability. The narrative statement should include: (i) a description of the Tribe's previous management experience which may include the administration of programs and services authorized by the Indian Self-Determination and Education Assistance Act, Indian Mineral Development Act or the Indian Sanitation Facility Construction Activity Act; (ii) a list of existing environmental and public health programs administered by the Tribal governing body and copies of related Tribal laws, policies, and regulations; (iii) a description of the entity (or entities) which exercise the executive, legislative, and judicial functions of the Tribal government; (iv) a description of the existing, or proposed, agency of the Tribe which will assume primary responsibility for establishing, reviewing, implementing and revising water quality standards; and (v) a description of the technical and administrative capabilities of the staff to administer and manage an effective water quality standards program or a plan which proposes how the Tribe will obtain the funds to acquire the administrative and technical expertise.

The Tribe's Application shows that it is reasonably expected to be capable of carrying out the functions of an effective water quality standards program in a manner consistent with the terms and purposes of the Act and applicable regulations. The record includes a memorandum reviewing the Tribe's capability to administer the water quality standards program prepared by Janis Gomes, EPA Region 9, Water Division, Tribal Office, and dated July 14, 2011. Ms. Gomes concluded that the Tribe has demonstrated the capability to administer an effective water quality standards program based on her: (1) review of the Application that includes a description of the Tribe's wide range of experience administering natural resource programs and how the Tribal government is organized; (2) direct experience working with the Tribe's staff; and (3) direct knowledge of the Tribe's efforts to develop water quality standards. The memorandum also identifies the Department of Environmental Protection as the designated Tribal agency that will review and act on all applications for a Section 401 certification, and concludes that the Tribe has the capability to administer an effective certification program.

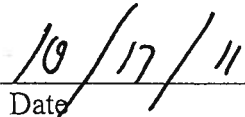
The Tribe has satisfied the requirements of 40 C.F.R. § 131.8(b)(4) by providing information which describes its capability to administer an effective water quality standards and certification program, and EPA has determined that the Tribe has met the requirements of 40 C.F.R. §§ 131.8(a)(4) and (b)(4).

III. Conclusion

EPA Region 9 has determined that the Dry Creek Rancheria Band of Pomo Indians Reservation has met the requirements of CWA Section 518(e), and 40 C.F.R. § 131.8, and therefore approves the Tribe's Application for TAS to administer a water quality standards program pursuant to CWA Sections 518(e) and 303(c). Pursuant to 40 C.F.R. § 131.4(c), the Tribe is also eligible to the same extent as a state for the purposes of certifications under CWA Section 401.



Jared Blumenfeld
Regional Administrator



Date